

No. 7639

---

---

In the United States Circuit Court of  
Appeals for the Ninth Circuit

---

ESTATE OF WINIFRED H. KINNEY, DECEASED, BY  
SHERWOOD KINNEY AND R. C. GORTNER, EXECU-  
TORS, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

ON PETITION FOR REVIEW OF DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS

---

BRIEF FOR THE RESPONDENT

---

FRANK J. WIDEMAN,  
*Assistant Attorney General.*

SEWALL KEY,  
ELLIS N. SLACK,  
*Special Assistants to the Attorney General.*

---

---

FILED

APR 15 1935

PAUL R. GYRIEN,



# INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute and other authorities involved.....	2
Statement.....	4
Summary of Argument.....	8
Argument:	
I. The decedent had a vested interest in the Abbot Kinney Trust, and the value of such interest forms a part of her gross estate.....	9
II. The Commissioner determined the value of the decedent's interest in the Abbot Kinney Trust to be \$201,567.10, and there was not sufficient evidence before the Board to overcome the presumption of correctness attaching to the Commissioner's determination.....	13
Conclusion.....	17

## CITATIONS

### Cases:

<i>Am-Plus Storage Battery Co. v. Commissioner</i> , 35 F. (2d) 167.....	14
<i>Avery v. Commissioner</i> , 22 F. (2d) 6.....	14
<i>Commissioner v. Rosser</i> , 64 F. (2d) 631.....	9
<i>Estate of Fair</i> , 132 Cal. 523.....	12
<i>Old Mission P. Cement Co. v. Commissioner</i> , 69 F. (2d) 676..	14
<i>Phillips v. Commissioner</i> , 283 U. S. 589.....	15
<i>Washburn, Estate of</i> , 11 Cal. App. 735.....	10
<i>Williams v. Williams</i> , 73 Cal. 99.....	10

### Statutes:

Deering's Civil Code of California, 1931:	
Sec. 690.....	3
Sec. 693.....	3
Sec. 694.....	3
Sec. 695.....	4
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302 (U. S. C. App., Title 26, Sec. 1094).....	2

### Miscellaneous:

Gray's Rule Against Perpetuities (3d Ed.), Sec. 9.....	9
Treasury Regulations 70, Art. 13.....	2



**In the United States Circuit Court of  
Appeals for the Ninth Circuit**

---

No. 7639

ESTATE OF WINIFRED H. KINNEY, DECEASED, BY  
Sherwood Kinney and R. C. Gortner, Executors,  
petitioner

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS*

---

**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The only previous opinion in this case is that of the Board of Tax Appeals (R. 54-61), which is reported at 30 B. T. A. 604.

**JURISDICTION**

This appeal involves estate taxes in the amount of \$3,968.07, and is taken from a decision of the Board of Tax Appeals entered on May 5, 1934 (R. 62). The case is brought to this Court by petition for review filed July 30, 1934 (R. 62-69), pursuant to the provisions of Sections 1001-1003

of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

#### QUESTIONS PRESENTED

1. Whether the decedent at the time of her death owned a vested interest in one-ninth of the corpus of a certain trust created by decedent's husband.

2. The Commissioner determined the value of such interest to be \$201,567.10. Was there sufficient evidence before the Board to overcome the presumption of correctness attaching to the Commissioner's determination?

#### STATUTE AND OTHER AUTHORITIES INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part as follows:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;  
\* \* \* (U. S. C. App., Title 26, Sec. 1094).

Treasury Regulations 70, promulgated under the Revenue Act of 1926:

ART. 13. *Valuations.*—(1) *General.*—The value of all property includible in the gross estate is the fair market value thereof at the time of the decedent's death. The fair market value is the price at which property

would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the decedent's death, and it is shown that the selling price reflects the fair market value thereof as of the date of decedent's death, the selling price will be accepted. Neither depreciation nor appreciation in value subsequent to the date of decedent's death will be considered. All relevant facts and elements of value should be considered in every case.

\* \* \* \* \*

Stock in a close corporation should be valued upon the basis of the company's net worth, earning and dividend-paying capacity, and all other factors having a bearing upon the value of the stock. Complete financial and other data upon which the estate bases its valuation should be submitted in duplicate with the return.

Deering's Civil Code of California, 1931, provides:

§ 690. *Future interest, what.*—A future interest entitles the owner to the possession of the property only at a future period.

§ 693. *Kinds of future interests.*—A future interest is either:

1. Vested; or
2. Contingent.

§ 694. *Vested interests.*—A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the

property, upon the ceasing of the intermediate or precedent interest.

§ 695. *Contingent interests*.—A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

#### STATEMENT

The facts may be summarized as follows (R. 19-53):

The decedent, Winifred H. Kinney, died testate on December 6, 1927 (R. 19). On October 28, 1918, Abbot Kinney executed a trust instrument, the material parts of which read as follows (R. 20-23):

(2) That Abbot Kinney of Los Angeles County, California, herein designated the trustee, does hereby covenant and declare that he has and holds the legal title to the following described property in trust for the uses and purposes hereinafter expressed, to wit:

(3) All shares of stock owned by and all shares standing in the name of Abbot Kinney on the books of the company in the Abbot Kinney Company, a corporation, organized under the laws of California, and which said title and ownership of shares includes all shares heretofore issued by said company, except three (3) shares.

(4) That said trustee shall have the power to sell, transfer, convey, and mortgage all or any of said property, and to receive the rents and profits from said property, and as incidental thereto to manage said prop-

erty and vote all shares of stock, and to pay and apply said rents and profits for the support and maintenance of the following-named persons, in the proportions herein-after stated, to wit:

(5) To Thornton Kinney one-sixth ( $\frac{1}{6}$ ); to Sherwood Kinney one-sixth ( $\frac{1}{6}$ ); to Innes Kinney one-sixth ( $\frac{1}{6}$ ); to Carleton Kinney one-sixth ( $\frac{1}{6}$ ); to Winifred H. Kinney for the support and maintenance of herself, and for the support and maintenance of the two minor children of Abbot Kinney, to wit: Helen Kinney and Clan Kinney, to be controlled and applied by said Winifred H. Kinney, one-third ( $\frac{1}{3}$ ); provided however that during the life of Abbot Kinney, trustee above named, he shall act as the sole trustee under this declaration of trust, and he being the sole trustor and maker of this trust shall have the power to revoke this trust at any time during his lifetime, and during his lifetime he reserves and shall have the right to receive and to apply one-half of all the rents, income, and profits from the property above described for his sole use as he may determine.

\*            \*            \*            \*            \*

(7) Upon the termination of this trust, unless revoked, the title to the whole of said property, so held in trust, shall immediately vest in the above-named beneficiaries by title absolute, in the same proportions above named for rents and profits and the said one-third ( $\frac{1}{3}$ ) above set forth for the sup-

port of Winifred H. Kinney, Helen Kinney, and Clan Kinney, will pass to them in equal shares by absolute title.

\*            \*            \*            \*            \*

(11) Winifred H. Kinney, wife of said Abbot Kinney, hereby joins in this instrument, and hereby declares that all of said property transferred in trust as aforesaid is the separate property and estate of said Abbot Kinney, subject to his disposition and control, and hereby renounces all claims to said property as community property or otherwise, and sets the same apart as the sole property and estate of said Abbot Kinney.

Abbot Kinney died in November 1920 (R. 20), and by the terms of the trust instrument the trust was to terminate twelve years after such date (R. 22).

The fair market value of the Abbot Kinney Company on December 6, 1927, the date of decedent's death, was \$2,791,616.84, its liabilities on such date were \$977,512.91, leaving a net fair market value of \$1,814,103.93 (R. 27). On July 1, 1930, Innes Kinney sold a one-sixth beneficial interest in the Abbot Kinney Trust to Carleton Kinney for a recited consideration of \$133,000. On August 5, 1930, Thornton Kinney sold a one-sixth beneficial interest in said trust to Sherwood Kinney for a recited consideration of \$133,000 (R. 27 and Exs. A and B, R. 29-53). The net worth of the Abbot

Kinney Company on June 30, 1930, as shown by its books, was \$1,438,016.60 (R. 28).

It was stipulated that if C. C. Hogan, Trust Officer, Security-First National Bank of Los Angeles, were called as a witness he would testify that in his opinion Mrs. Kinney could not have sold her interest in the trust for more than 50 percent of the pro rata value of one-ninth of the capital stock of the corporation in 1927; that if W. D. Newcomb, Jr., President of the First National Bank, Venice, California, were called as a witness he would testify that the market value of Mrs. Kinney's interest in the trust in 1927 was not in excess of 25 percent of the fractional net worth of the corporation; that Herbert Hertel, Manager, Venice Branch, Security-First National Bank of Los Angeles, if called as a witness would testify that in his opinion Mrs. Kinney's beneficial interest was worth  $33\frac{1}{3}$  percent of the fractional net worth of the corporation's assets in 1927 (R. 28-29).

By a codicil to her will the decedent bequeathed her beneficial interest in the trust to her two children (R. 25).

In filing the estate tax return the executor did not include in the gross estate the value of decedent's interest in the Abbot Kinney Trust. The Commissioner held that the value of such interest was a part of decedent's gross estate and determined the value to be one-ninth of the fair market value of the assets of Abbot Kinney Company as

of December 6, 1927, or \$201,567.10 (R. 25), and determined a deficiency in the amount of \$3,968.07 (R. 13). The Commissioner's determination was affirmed by the Board of Tax Appeals (R. 62).

#### SUMMARY OF ARGUMENT

1. If decedent's interest in the Kinney Trust was vested, it formed a part of her gross estate.

The law favors vested, rather than contingent remainders, and this is particularly true under the California law, where every interest is presumed to be vested unless a contrary intention is clearly manifest. A future interest is vested when there is a person in being who would have a right to immediate possession of the property upon the ceasing of the precedent interest. Obviously the decedent's interest was vested, and the value thereof should be included in her gross estate.

2. The decedent owned a one-ninth interest in the Kinney Trust, and the Commissioner determined the value of such interest to be \$201,567.10. This value was found by taking one-ninth of the fair market value of the assets of the Abbot Kinney Company, whose stock comprised the corpus of the trust. The only other evidence before the Board as to the value of the interest was the unsupported opinion of three banking officials and a record of two sales in 1930, over two and a half years after the basic valuation date. Such evidence falls far short of overcoming the presumption of correctness attaching to the Commissioner's determination.

## ARGUMENT

## I

**The decedent has a vested interest in the Abbot Kinney Trust, and the value of such interest forms a part of her gross estate**

The sole question presented under this issue is whether the decedent, Winifred H. Kinney, had a vested interest in the trust estate created by Abbot Kinney on October 18, 1918. If her interest was vested, it should be included in the gross estate; if it was contingent, it should be excluded. *Commissioner v. Rosser*, 64 F. (2d) 631 (C. C. A. 3d).

Section 694 of Deering's Civil Code of California (1931) provides that a future interest is vested when there is a person in being who would have a right to immediate possession of the property upon the ceasing of the intermediate or precedent interest. Section 695 provides that a future interest is contingent while the person in whom, or the event upon which, it is limited to take effect remains uncertain.

The classic definition of vested and contingent remainders is to be found in Gray's "The Rule Against Perpetuities" (3d Ed.), Sec. 9, where it is said (p. 5):

Remainders are either vested or contingent. A remainder is vested if, at every moment during its continuance, it becomes a present estate, whenever and however the preceding freehold estates determine. A re-

mainder is contingent if, in order for it to become a present estate, the fulfilment of some condition precedent, other than the determination of the preceding freehold estates, is necessary. \* \* \*

In *Estate of Washburn*, 11 Cal. App. 735, 106 Pac. 415, the court said in distinguishing between vested and contingent remainders (p. 740):

The broad distinction between vested and contingent remainders is this: In the first, there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose *right* to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. It may never happen, or it may not happen until after the particular estate upon which it depends shall have terminated, so that the estate in remainder will never take effect.

It is generally said that the law favors vested, rather than contingent estates, and this is particularly true under the California law. *Estate of Washburn*, *supra*; *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394. In the latter case the will provided that three years after testator's death the executor was to pay to Percy Williams the sum of \$50,000. The question involved as stated by the court was (p. 101):

Whether or no said legacy or devise of fifty thousand dollars to defendant Percy Williams is an absolute and vested estate in him, and of which the time of enjoyment only is postponed until distribution, so that on his death, before distribution, intestate, it would pass to his legal heirs, or could now be transmitted by his will or conveyed by deed, as he might desire; \* \* \*.

In holding that he had a vested interest the court said (p. 102):

The law favors the vesting of interests, and every interest will be presumed to be vested, unless a contrary intention is clearly manifest. \* \* \*

It would seem to follow, then, as a matter not admitting of doubt, that under the provisions referred to, the interest of Percy in this share is a vested future interest in fee, which will pass by grant, devise, or succession, and which he may alienate at his pleasure. If he should die before distribution without such alienation, it will vest in his heirs, devisees, or legatees.

The instant case meets every requirement of the definition of a vested interest. The decedent was in being and there was no contingency that could defeat her right to possession upon the termination of the precedent estate. She had such a vested interest that she could have sold it or given it away at her pleasure. In fact, she must have considered her interest vested, because by a codicil to her will

she left her one-ninth interest in the trust to her two children.

Petitioners argue that since there were no granting words in the trust instrument, except those contained in the paragraph which provides that the title to the trust property shall immediately vest in the beneficiaries upon the termination of the trust, the interest of the decedent could not have been vested. But it was not necessary for the instrument to contain granting words because the instrument, as executed, created an executed trust, which gave to the beneficiaries not only the income from the trust but a vested interest in the corpus. Obviously what was meant by the provision was that upon the termination of the trust the legal title should vest in the beneficiaries—the equitable title having already vested.

A case similar in all respects to the instant one is that of *Estate of Fair*, 132 Cal. 523, 525, 60 Pac. 442. There the testator left his estate to trustees “to have and to hold the same, in trust, during the lives” of his children, on the death of the survivor to his brothers and sisters. The court held that upon the death of the testator the persons entitled to the remainder took a vested interest therein, and that the provision directing the trustees to convey to them was unnecessary.

The situation in the instant case is briefly this: Abbot Kinney, by an instrument dated October 28, 1918, created a trust which was revocable by him-

self at any time during his lifetime and which was to terminate twelve years after his death. Upon his death in 1920, the trust became irrevocable, and each of the beneficiaries became entitled to their portion of the income of the trust during its life and to the corpus upon its termination. Obviously the interest of the decedent was vested, and its value should be included in her gross estate.

## II

**The Commissioner determined the value of the decedent's interest in the Abbot Kinney Trust to be \$201,567.10, and there was not sufficient evidence before the Board to overcome the presumption of correctness attaching to the Commissioner's determination**

Petitioners argue in the alternative, that if it be decided that the decedent had a vested interest in the trust in question, the Commissioner's determination of the value of such interest was excessive.

The Abbot Kinney Trust was the owner of all the issued and outstanding capital stock of the Abbot Kinney Company, and it was stipulated before the Board that on December 6, 1927, the date of decedent's death, the fair market value of the assets of such company was \$2,791,616.84; its total liabilities amounted to \$977,512.91; leaving a fair market value of \$1,814,103.93 for the net assets as of the date of decedent's death. As the decedent owned a one-ninth interest in the trust, the Commissioner determined the value of such interest to be one-ninth of \$1,814,103.93, or \$201,567.10.

It was stipulated that on July 1 and August 5, 1930, over two years and a half after the date of decedent's death, Innes Kinney and Thornton Kinney, respectively, each sold their one-sixth interest in the Abbot Kinney Trust for a recited consideration of \$133,000 (R. 27); that the net worth of the Abbot Kinney Company, as shown by its books, on June 30, 1930, was \$1,438,016.60; that if certain banking officials were called as witnesses, one would testify that the decedent's interest in the trust could not have been sold for more than 50 percent of the pro rata value of one-ninth of the capital stock of the corporation in 1927; another would testify that the value of decedent's interest in the trust in 1927 was not in excess of 25 percent of the fractional net worth of the corporation; and another would testify that in his opinion the decedent's interest was worth 33 $\frac{1}{3}$  percent of the fractional net worth of the corporation's assets in 1927.

It is well settled that the determination of the Commissioner is prima facie correct, and the burden is on the taxpayer of proving the determination to be erroneous. *Old Mission P. Cement Co. v. Commissioner*, 69 F. (2d) 676 (C. C. A. 9th); *Am-Plus Storage Battery Co. v. Commissioner*, 35 F. (2d) 167 (C. C. A. 7th); *Avery v. Commissioner*, 22 F. (2d) 6 (C. C. A. 5th). It is likewise true that the value of decedent's interest in the Abbot Kinney Trust was an issue of fact, and the

finding of the Board must be sustained if based upon any substantial evidence. *Phillips v. Commissioner*, 283 U. S. 589.

The opinion testimony of the three banking officials was entitled to no weight whatsoever. The purpose of expert testimony is to assist and guide the Board or jury in understanding the facts, but where as here, it is not shown what facts were taken into consideration by the witnesses in arriving at their opinion of the value of decedent's interest, their testimony is valueless. The only thing in the stipulation that would tend to qualify them as experts, so that their opinion would be admissible as evidence, is the statement that they are connected with certain banks. But such fact standing alone does not qualify them as experts. It was not shown that any one of the three had any knowledge or information whatsoever concerning the Abbot Kinney Trust. From what is shown in the record, they may never have heard of it. Nor was it shown that they had ever had any experience in valuing stocks of a corporation or its assets.

We next come to the sales made by two of the beneficiaries in July and August 1930 of their interests in the trust. Each sold a one-sixth interest in the trust to two of the other beneficiaries for the sum of \$133,000. The net worth of the Abbot Kinney Company, as shown by its books on June 30, 1930, was \$1,438,016.60. Petitioners argue that such sales indicate that the value of decedent's

interest was less than that determined by the Commissioner. But it will be observed that such sales were made over two and a half years after December 6, 1927, the basic valuation date, and are therefore too remote to serve as a guide in determining the value of decedent's interest. It will also be observed that the Commissioner based his valuation upon the *fair market value* of the assets of the company on December 6, 1927, and that there was no evidence before the Board as to fair market value of the assets at or near the sales date. It is true, the Board had before it a copy of the company's balance sheet as of June 30, 1930, but that shows only the book value of the assets which may be much more or much less than the fair market value, depending on the circumstances in each case. Manifestly, without knowing what the fair market value of the assets were on such date, the evidence concerning the sales does not furnish any basis for comparison.

It will be noted that the sales were made between members of the Kinney family, and the wording of the sales agreements indicates that there were probably numerous other considerations which were not recited therein. Further, on account of the great slump in the market value of securities in 1929 and 1930, of which this Court will take judicial notice, a sale in 1930 would not furnish any guide for determining value in 1927.

In the absence of sales on the market of the shares of stock comprising the trust, the only proper method of determining the value of decedent's interest is to take the fair market value of the assets of the company. This the Commissioner did and found decedent's interest to be of the value of \$201,567.10, and the only evidence before the Board tending to show a different value is that referred to above. Obviously such evidence falls far short of overcoming the presumption of correctness attaching to the Commissioner's determination.

#### CONCLUSION

It follows that the decision of the Board of Tax Appeals is correct, is in accordance with law, and should be affirmed.

Respectfully submitted.

FRANK J. WIDEMAN,  
*Assistant Attorney General.*

SEWALL KEY,

ELLIS N. SLACK,

*Special Assistants to the Attorney General.*

APRIL 1935.

EL